APPENDIX A

IN THE

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, *Respondent,* v. WILLIAM McKINNEY, JR., *Appellant.*	**No. WD 31553** **Opinion filed** **March 23, 1982**

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Honorable Louis Lombardo, Judge

Before Kennedy, P.J., Shangler and Wasserstrom, JJ.

Appellant was convicted upon jury trial of second-degree robbery, § 569.030, RSMo 1978, and armed criminal action, § 571.015, RSMo 1978, in the March 8, 1979, robbery of Pamela Copeland, which yielded $1,142 money belonging to the Granada Inn. He was sentenced to 11 years' imprisonment on the robbery charge and 24 years' imprisonment on the armed criminal action charge, to be served concurrently.

He appeals with two complaints about his trial. He claims the court erred in admitting testimony of out-of-court identification because of impermissibly suggestive police procedures, and in allowing in-court identification by witnesses Copeland, Goss and Cayer. Second, he complains of his armed criminal action conviction as being in violation

of his constitutional rights against double jeopardy. criminal action conviction.

We affirm the robbery conviction and reverse the armed criminal action conviction.

The facts briefly stated are as follows:

Two black men on March 8, 1979, according to the state's evidence, approached the reservation desk of the Granada Inn. One of them (later identified as the defendant) inquired about a room, the second one standing a few feet to the rear. Pamela Copeland, the desk clerk, and Chris Goss, the bellman, were behind the desk. As Pamela was asking defendant how many nights he intended to stay, he produced a handgun and ordered her to give him all her money. She gave him the tray containing the hotel money, which she estimated to be about $1,200. The second man, who then came behind the reservation desk, took the change which was not in the tray.

Witness Cayer, a guest at the hotel, was seated in the lobby. He had noticed the two men in the lobby for some minutes before the robbery "kind of lingering around the stamp machine and a shoeshine machine, put a quarter in there, just kind of looking around, just kind of standing there." The robbers forced him to come to the reception desk. He, along with the two hotel employees, were made to lie down behind the desk. The robbers made their escape.

The police arrived and interviewed the three.

Two days later the police exhibited an array of photographs of individuals to Pamela, Goss and Cayer, the three witnesses. Defendant's picture was identified as that of one of the robbers. Three days later the witnesses separately picked out defendant from a lineup at the police station.

1. *Pre-trial and in-court identification testimony.*

Appellant's first point—that the court erred in allowing testimony of out-of court and in-court identification of defendant—may be quickly disposed of. The testimony was given with no objection at trial. Its admission is not assigned as error in the motion for new trial. Rule 29.11(d). It is thus not preserved for review. State v. Smith, 609 S.W.2d 478, 480 (Mo. App. 1980); State v. Timmons, 584 S.W.2d 129, 133 (Mo. App. 1979).

We have nonetheless, with appellant's criticisms before us, examined the record in search of plain error, Rule 29.12(b), in the admission of the identification evidence. The identification procedures used by the police were not impermissibly suggestive, State v. Sanders, 621 S.W.2d 386, 388-389 (Mo. App. 1981); State v. Bivens, 558 S.W.2d 296, 299 [5] (Mo. App. 1977), and the in-court identification was entirely proper. Neil v. Biggers, 409 U.S. 188, 199 (1972); State v. Higgins, 592 S.W.2d 151, 160 (Mo. banc 1979), appeal dismissed, 446 U.S. 902 (1980). The defendant closely cross-examined the witnesses about identification procedures to bring out any uncertainty in the witnesses' identification, so that the jury was equipped to evaluate their reliability. See State v. Brunson, 555 S.W.2d 359, 361-362 [5] (Mo. App. 1977).

The identification testimony was proper, and would correctly have been admitted even over defendant's objection. The point is disallowed.

2. *Armed criminal action, double jeopardy.*

Defendant's next point is that his conviction for armed criminal action is invalid as in violation of his rights against double jeopardy. This point must be sustained.

Where a defendant is convicted of second-degree robbery, his conviction for armed criminal action, growing out

of the same incident, constitutes a violation of his constitutional right against double jeopardy. In such a case the armed criminal action conviction must be set aside. State v. Kane, No. WD 31611 (Mo. App. August 6, 1981), State v. Kane, No. 63324 (Mo. banc March 9, 1982); State v. Thompson, No. WD 31513 (March 30, 1981); State v. Thompson, No. 63325 (Mo. banc March 9, 1982).

Defendant's conviction for second-degree robbery is affirmed. His conviction for armed criminal action is reversed.

All concur.

Don W. Kennedy, Presiding Judge

APPENDIX B

Section 556.041, RSMo 1978, reads as follows:

"556.041. Limitation on conviction for multiple offenses.—When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if

(1) One offense is included in the other, as defined in section 556.046; or

(2) Inconsistent findings of fact are required to establish the commission of the offenses; or

(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

Section 556.046, RSMo 1978, reads as follows:

"556.046. Conviction of included offenses.—1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) It is specifically denominated by statute as a lesser degree of the offense charged; or

(3) It consists of an attempt to commit the offense

charged or to commit an offense otherwise included therein.

2. The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

Section 569.030, RSMo 1978, reads as follows:

"**569.030. Robbery in the second degree.**—1. A person commits the crime of robbery in the second degree when he forcibly steals property.

2. Robbery in the second degree is a class B felony."

Section 571.015, RSMo 1978 (effective Jan. 1, 1979), reads as follows:

"**571.015. Armed criminal action, defined, penalty.**—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee by, with, or through the use, assistance, or aid of dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

Section 571.017, RSMo Supp. 1982 (effective August 13, 1982), reads as follows:

"571.017. Nothing contained in any other provision of law, except as provided in subsection 4 of section 571.015, shall prevent imposition of sentences for both armed criminal action and the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."

Section 559.225, RSMo Supp. 1976 (repealed, Jan. 1, 1979), reads as follows:

"559.225. **Armed criminal action—penalty—exceptions.**—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed

pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

APPENDIX C

Section 750.227(b), M.C.L.A., reads as follows:

"Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976, No. 6, § 1, Eff. Jan. 1, 1977." [footnote omitted.]

Section 750.529, M.C.L.A., reads as follows:

"750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloni-

ously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960."